Office - Supreme Court, U.S.
FILED
DEC 3 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-469

In the Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM C. BUSH, PETITIONER

v.

WILLIAM R. LUCAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

BARBARA L. HERWIG
WENDY M. KEATS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a federal employee who claims that he was demoted in violation of the First Amendment, and who is reinstated and awarded full back pay after pursuing his civil service remedies, also has an implied constitutional cause of action for damages against the official who approved his demotion.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Summary of argument	7
Argument:	
A federal employee challenging a demotion who can obtain reinstatement and back pay through civil service remedies may not also seek damages, under an implied constitutional cause of action, from an official who approved the demotion	12
A. Introduction	12
B. The civil service remedies available to petitioner precluded an implied constitutional damages action	18
1. The differences between the civil service remedies and the implied damages remedy do not require that petitioner be allowed to bring a damages action	18
2. The complexity of the civil service remedies, and their frequent adjustment, reflect Congress's intent to occupy the field	26
3. When Congress established the civil service remedies, it assumed that courts would not play an active role in remedying federal employees' grievances	34
4. Creating a personal damages remedy in this context would thwart important congressional policies	37
C. Special factors require the court to hesitate before creating an implied damages remedy for federal employees	42

Argument—Continued Page

1. Federal employees challenging adverse personnel actions do not have a strong claim to judicial protection 42
2. Disputes concerning the federal employment relationship are properly addressed, in the first instance, in a specialized administrative agency, not a court 45

Conclusion 49

TABLE OF AUTHORITIES

Cases:

Abood v. *Detroit Board of Education*, 431 U.S. 209 34
Aetna Life Insurance Co. v. *Haworth*, 300 U.S. 227 24
Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 47
Armstrong v. *United States*, 405 F.2d 1275, cert. denied, 395 U.S. 934 20
Arnett v. *Kennedy*, 416 U.S. 134 ..... 6, 17, 18, 28, 29, 38
Arrow Transportation Co. v. *Southern Ry.*, 372 U.S. 658 45
Avitzur v. *Davidson*, 549 F. Supp. 399 17
Bailey v. *Richardson*, 182 F.2d 46, aff'd by an equally divided court, 341 U.S. 918 36
Barr v. *Matteo*, 360 U.S. 564 4
Bell v. *Hood*, 327 U.S. 678 12
Bielec v. *United States*, 456 F.2d 690 20
Bishop v. *Tice*, 622 F.2d 349 ..... 17, 19, 25-26
Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 ..... *passim*
Bollman, Ex parte, 8 U.S. (4 Cranch) 75 12
Branti v. *Finkel*, 445 U.S. 507 34
Broussard v. *United States Postal Service*, 674 F.2d 1103 17
Brown v. *General Services Administration*, 425 U.S. 820 ..... 8, 9, 16, 22, 27, 28, 36, 47

Cases—Continued — Page

Burnap v. *United States*, 252 U.S. 512 36
Butz v. *Economou*, 438 U.S. 478 ..... 20-21, 38, 39
Cafeteria Workers v. *McElroy*, 367 U.S. 886..... 18
Cale v. *City of Covington*, 586 F.2d 311 26
Cannon v. *University of Chicago*, 441 U.S. 677.... 35
Carlson v. *Green*, 446 U.S. 14 ..... *passim*
Carey v. *Piphus*, 453 U.S. 247 44
Cary v. *Curtis*, 44 U.S. (3 How.) 236 16
Chandler v. *Roudebush*, 425 U.S. 840 47
Charlton v. *United States*, 412 F.2d 390 20
City of Milwaukee v. *Illinois*, 451 U.S. 304..15, 16, 17, 24, 27, 28, 35
Dabney v. *Freeman*, 358 F.2d 533 20
Davis v. *Passman*, 442 U.S. 228 ..... *passim*
Dean v. *Gladney*, 621 F.2d 1331, cert. denied, 450 U.S. 983 25
Decatur v. *Pauling*, 39 U.S. (14 Pet.) 497 36
D'Oench, Duhme & Co. v. *Federal Deposit Insurance Corp.*, 315 U.S. 447 14
Edmonds v. *Compagnie Generale Transatlantique*, 443 U.S. 256 35
Egger v. *Phillips*, 669 F.2d 497 17
Ellis v. *Blum*, 643 F.2d 68 25
Erie R.R. v. *Tompkins*, 304 U.S. 64 16
Fitzgerald v. *United States Lines*, 374 U.S. 16.... 14
Florida Avocado Growers v. *Paul*, 373 U.S. 132.... 28
Givhan v. *Western Line Consolidated School District*, 439 U.S. 410 46
Gissen v. *Tackman*, 537 F.2d 784 22
Great American Federal Savings & Loan Association v. *Novotny*, 442 U.S. 366 47
Gregoire v. *Biddle*, 177 F.2d 579, cert. denied, 339 U.S. 949 25
Harlow v. *Fitzgerald*, No. 80-945 (June 24, 1982) 25, 39
Holden v. *Finch*, 446 F.2d 1311 46
Isbrandtsen Co. v. *Johnson*, 343 U.S. 779 ..... 35, 36
Jenkins v. *Macy*, 237 F. Supp. 60, aff'd, 357 F.2d 62 20
Johnson v. *Railway Express Agency*, 421 U.S. 454 47

Cases—Continued

	Page
Jones v. *City of Memphis*, 586 F.2d 622, cert. denied, 440 U.S. 914	25
Kansas v. *Colorado*, 206 U.S. 46	14
Keim v. *United States*, 177 U.S. 290	36
Kremer v. *Chemical Construction Corp.*, No. 80-6045 (May 17, 1982)	48
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682	15
Lehman v. *Nakshian*, 453 U.S. 156	23
Mahone v. *Waddle*, 564 F.2d 1018	26
Maine v. *Thiboutot*, 448 U.S. 1	27
McCardle, Ex parte, 74 U.S. (7 Wall.) 506	16
McDonnell Douglas Corp. v. *Green*, 411 U.S. 792	47
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, No. 80-203 (May 3, 1982)	35
Middlesex County Sewerage Authority v. *National Sea Clammers Association*, 453 U.S. 1	27
Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618	25, 35, 36, 40
Mohasco Corp. v. *Silver*, 447 U.S. 807	25
Molina v. *Richardson*, 578 F.2d 846, cert. denied, 439 U.S. 1048	25
Monell v. *Department of Social Services*, 436 U.S. 658	25
Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246	13
Morton v. *Mancari*, 417 U.S. 535	35
Nadar v. *Allegheny Airlines, Inc.*, 426 U.S. 290	34
National Railroad Passenger Corp. v. *National Association of Railroad Passengers*, 414 U.S. 453	45
Newman v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400	48
New Jersey v. *New York*, 283 U.S. 336	15
New York Gaslight Club, Inc. v. *Carey*, 447 U.S. 54	21
Nixon v. *Fitzgerald*, No. 79-1738 (June 24, 1982)	39
Northwest Airlines, Inc. v. *Transport Workers Union*, 451 U.S. 77	15, 25, 27
Owen v. *City Independence*, 445 U.S. 622	39
Parratt v. *Taylor*, 451 U.S. 527	23
Pennsylvania v. *Mimms*, 434 U.S. 106	43

Cases—Continued — Page

Pickering v. *Board of Education*, 391 U.S. 563 46
Purtill v. *Harris*, 658 F.2d 134, petition for cert. pending, No. 81-1010 ..... 17, 22
Sampson v. *Murray*, 415 U.S. 61 ..... 18, 28, 31, 36
Sheldon v. *Sill*, 49 U.S. (8 How.) 441 12
Sonntag v. *Dooley*, 650 F.2d 904 17
Tarpley v. *Greene*, 684 F.2d 1 ..... 23, 25
Texas & Pacific Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 34-35
Texas Industries, Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630 ..... 16, 24, 27, 28
Textile Workers Union v. *Lincoln Mills*, 353 U.S. 448 14
Toohey v. *Nitze*, 429 F.2d 1332, cert. denied, 400 U.S. 1022 20
Twiggs v. *Small Business Administration*, 541 F.2d 150 20
United States v. *Carolene Products Co.*, 304 U.S. 144 43
United States v. *Fisher*, 6 U.S. (2 Cranch) 358 16
United States v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 12
United States v. *Lee*, 106 U.S. 196 43
United States v. *Little Lake Misere Land Co.*, 412 U.S. 580 16
United States v. *Standard Oil Co.*, 332 U.S. 301 43
United States v. *Testan*, 424 U.S. 392 ..... 31, 36
United States v. *Utah Construction & Mining Co.*, 384 U.S. 399 48
United Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 46
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 46
Universities Research Association, Inc. v. *Coutu*, 450 U.S. 754 27
Vigil v. *Post Office Department*, 406 F.2d 921 20
Wathen v. *United States*, 527 F.2d 1191 46
White v. *Berry*, 171 U.S. 366 36
Wren v. *Merit Systems Protection Board*, 681 F.2d 867 46
Yerger, Ex parte, 75 U.S. (8 Wall.) 85 16
Young v. *Hampton*, 568 F.2d 1253 20

Constitution, statutes and regulations: Page

United States Constitution:
Article III, Section 2 16
First Amendment 3, 4, 5, 9, 11, 18, 19, 30, 46
Fourth Amendment 12, 13, 43
Fifth Amendment 13
Eighth Amendment 14
Act of Aug. 24, 1912, ch. 389, Section 6, 37 Stat. 555 29
Back Pay Act of 1948 (Act of June 10, 1948, ch. 447, 62 Stat. 354) 31
Back Pay Act of 1966, 5 U.S.C. (& Supp. IV) 5596 .. 21
Civil Rights Act of 1964, Title VII, 42 U.S.C. (& Supp. IV) 2000e *et seq.*:
42 U.S.C. 2000e-2(a)(1) 43
42 U.S.C. 2000e-5(g) 23
42 U.S.C. 2000e-16 ..... 13, 22
42 U.S.C. 2000e-16(a) 13
Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 5 U.S.C. (Supp. V) 1101 *et seq.* 20
Section 907, 92 Stat. 1227 33
5 U.S.C. (Supp. V) 1205 32
5 U.S.C. (Supp. V) 1206 33
5 U.S.C. (Supp. V) 1206(c)(1)(A) 33
5 U.S.C. (Supp. V) 1206(c)(1)(B) 33
5 U.S.C. (Supp. V) 1206(g) 33
5 U.S.C. (Supp. V) 1207(b) 33
5 U.S.C. (Supp. V) 2302(b)(8)(A) 33
5 U.S.C. (Supp. V) 5401 et seq. 38
5 U.S.C. (Supp. V) 7513(a) 18
5 U.S.C. (Supp. V) 7701 32
5 U.S.C. (Supp. V) 7701(c) 32
5 U.S.C. (Supp. V) 7703 32
5 U.S.C. (Supp. V) 7703(c)(1) 33
Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 32-33
Federal Tort Claims Act:
28 U.S.C. 1346(b) 14
28 U.S.C. 2671 *et seq.* 14

Constitution, statutes and regulations—Continued Page

Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (& Supp. IV) 1251 *et seq.* 27
Labor-Management Relations Act, 29 U.S.C. 185 (a) 14
Lloyd-LaFollette Act, 5 U.S.C. 7501 ..... 18, 28, 29-30, 33
Pendleton Act of 1883 (Act of Jan. 16, 1883, ch. 27, 22 Stat. 403) 29
Section 1, 22 Stat. 403 29
Section 2, 22 Stat. 403-404 29
Veterans Preference Act of 1944 (Act of June 27, 1944, ch. 287, Section 14, 58 Stat. 391, 5 U.S.C. 7501, 7512 31
5 U.S.C. 706 3
28 U.S.C. 1331(a) 12
28 U.S.C. 2680(h) 35
42 U.S.C. (Supp. IV) 1983 ..... 25, 27
5 C.F.R. (1975):
Section 752.104(a) 18
Section 752.202(a) 19
Section 752.202(b) 19
Section 752.202(f) 2, 19
Section 752.203 ..... 3, 19
Section 772.101 19
Section 772.307 31
Section 772.307(c) 20
Section 772.310 ..... 4, 20

Miscellaneous: Page

P. Bator, P. Mishkin, D. Shapiro &. H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* (2d ed. 1973) 14
Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. on Leg. 1 (1979) 41
Chaturvedit, *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 Nw. U.L. Rev. 287 (1968) 36
48 Cong. Rec. (1912):
p. 4513 30
p. 4653 30
p. 4738 30

Miscellaneous—Continued

	Page
p. 5201	30
p. 5207	30
p. 5223	30
p. 5635	30
p. 5637	30
p. 5638	30
p. 10673	30
p. 10675	30
p. 10730	30
p. 10732	30
p. 10795	30
p. 10799	30
p. 10803	30
111 Cong. Rec. 2476 (1965)	32
129 Cong. Rec. (daily ed. Aug. 11, 1978):	
p. H8463	39
p. H8473	38
Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532 (1972)	25
J. Ely, *Democracy and Distrust* (1980)	43
T. Emerson, *The System of Freedom of Expression* (1970)	46
Exec. Order No. 10988, 27 Fed. Reg. 551 (1962)	31
Exec. Order No. 11491, 34 Fed. Reg. 17605 (1969)	31
Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953)	16, 40
Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109 (1969)	15
H.R. Rep. No. 32, 89th Cong., 1st Sess. (1965)	32
H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. (1978)	33, 37, 39, 41
H.R. Rep. No. 1436, 80th Cong., 2d Sess. (1948)	31
H.R. Rep. No. 1826, 47th Cong., 2d Sess. (1882)	29, 37
Johnson & Stoll, *Judicial Review of Federal Employee Dismissals and Other Adverse Actions*, 57 Cornell L. Rev. 178 (1972)	20
Katz, *The Jurisprudence of Remedies: Constitutional Legality And The Law Of Torts In Bell v. Hood*, 117 U. Pa. L. Rev. 1 (1968)	15

Miscellaneous—Continued Page

Landes & Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1 (1975) 25
Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 Va. L. Rev. 196 (1973) .. 21, 36
Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1 (1975) 14
Note, *"Damages or Nothing"—The Efficacy of the Bivens-Type Remedy*, 64 Cornell L. Rev. 667 (1979) 35
Note, *Dismissal of Federal Employees—The Emerging Judicial Role*, 66 Colum. L. Rev. 719 (1966) 36
Sager, *The Supreme Court, 1980 Term-Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981) 23
Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281 38
S. Rep. No. 95-696, 95th Cong., 2d Sess. (1978) .. 33, 37, 38
S. Rep. No. 1062, 89th Cong., 2d Sess. (1966) 31-32
Stewart & Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1195 (1982) 37
Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. Chi. L. Rev. 394 (1982) 27, 45
R. Vaughn, *Principles of Civil Service Law* (1976) 29

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-469

WILLIAM C. BUSH, PETITIONER

v.

WILLIAM R. LUCAS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (Pet. App. a-1 to a-12) is reported at 647 F.2d 573. The order of this Court vacating the initial judgment of the court of appeals and remanding the case for further consideration (Pet. App. b-1) is reported at 446 U.S. 914. The initial opinion of the court of appeals (Pet. App. c1-1 to c1-14) is reported at 598 F.2d 958. The opinion and order of the district court (Pet. App. d-1 to d-17), and the decisions of the Civil Service Commission (Pet. App. e-1 to g-3), are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1981. The petition for a writ of certiorari was filed on September 4, 1981, and was granted on June 28, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an aerospace engineer who has been employed for more than seven years by the National Aeronautics and Space Administration (NASA) at the Marshall Space Flight Center in Alabama. The Center is one of NASA's major facilities, employing 4500 persons (J.A. 18). Respondent is the Director of the Center, with responsibility for all of the Center's operations (J.A. 18-19). In May and June 1975, following major reorganizations at the Center, petitioner, in several newspaper and television interviews, stated that he had little meaningful work to do and that the position to which he had been reassigned was a "travesty." These statements were widely publicized (Pet. App. d-2 to d-3).

The Director of Science and Engineering at the Center, who is not a party to this case, investigated petitioner's allegations (J.A. 45) and ultimately initiated proceedings to have petitioner removed from his position (J.A. 15; Pet. App. e-15). His principal charge was that petitioner "on more than one occasion publicly ma[d]e intemperate remarks which were misleading and often false, evidencing a malicious attitude * * * and generating an environment of sensationalism * * *." The Director of Science and Engineering further asserted that petitioner's "conduct has undermined morale at the * * * Center and brought disharmony and disaffection among fellow employees" (Pet. App. f-2 to f-3, e-7; emphasis omitted).

Respondent was responsible for reviewing the proposed discharge. See 5 C.F.R. 752.202(f) (1975). After petitioner submitted written and oral replies to the charges against him, respondent dismissed some of the charges and determined not to remove petitioner from his position (Pet. App. e-14). Respondent did decide, however, that certain of the charges were justified and that petitioner should be demoted two grades, from GS-14 to GS-12 (*id.* at f-2, f-4). Petitioner was notified of this action in November 1975 (J.A. 15).

2. Civil Service Commission regulations entitled petitioner to appeal his demotion to the Commission, and petitioner did so (5 C.F.R. 752.203 (1975); Pet. App. c1-6). After a three-day trial-type hearing that was open to the press and the public (Pet. App. e-2), the Commission's Federal Employee Appeals Authority upheld NASA's action (*id.* at e-41 to e-42). The Appeals Authority found that "the evidence clearly shows that [petitioner's new assignment] was not false or worthless" (*id.* at e-26) and that petitioner's statements "were actually motivated by [his] desire to have his position abolished for the personal benefit of being able to take early retirement and enter law school" (*id.* at e-35). The Appeals Authority concluded that petitioner's public "statements were misleading; that they generated an environment of sensationalism demeaning to the government, the agency, and its personnel at [the Center,] and that they impeded government efficiency and economy and adversely affected public confidence in the government service" (*id.* at e-31). The Appeals Authority also specifically rejected petitioner's assertion that respondent was biased against him and did not fairly review the charges (*id.* at e-14).

The Appeals Authority then considered, and rejected, petitioner's claim that his demotion violated the First Amendment. The Appeals Authority acknowledged that the First Amendment protects a wide range of speech by public employees, but noted that petitioner made "unwarranted public remarks critical of his agency for reasons of self-interest" (Pet. App. e-39). The Appeals Authority accordingly ruled that petitioner's "public remarks exceeded the bounds of expression protected by the first amendment" (*id.* at e-38).

Petitioner could have, but did not, bring suit in federal district court (Pet. App. d-15 n.5) to challenge the Commission's decision as arbitrary and capricious, unsupported by substantial evidence, or otherwise unlawful (see 5 U.S.C. 706; page 20, *infra*). Instead, two years after the Appeals Authority's decision, petitioner successfully requested that the Civil Service Commission's Ap-

peals Review Board reopen the administrative proceeding. See 5 C.F.R. 772.310 (1975). The Appeals Review Board accepted the factual conclusions reached in the earlier proceeding, and it again rejected petitioner's claim that respondent was biased against him (Pet. App. f-10 to f-11, f-14), but it agreed to reexamine petitioner's First Amendment claim. The Appeals Review Board noted that petitioner had "admitted to a certain amount of exaggeration," that the Appeals Authority had found that petitioner was motivated by a desire for personal gain, and that petitioner had acted "precipitous[ly] * * * and hasti[ly] in seeking public exposure." The Appeals Review Board determined, however, that the "evidence is insufficient to sustain a conclusion that [petitioner's] statements were actuated by 'malice'" (*id.* at f-17 to f-18). Consequently, even though petitioner's statements had caused "disruption of the orderly day-to-day routine of the agency," the Appeals Review Board concluded that "the balance in the instant case weighs in favor of [petitioner]" (*id.* at f-23). The Appeals Review Board recommended that petitioner be retroactively restored to his former position and awarded back pay (*id.* at f-26), and NASA accepted this recommendation.[1]

3. In 1976, while his administrative appeal was pending, petitioner sued respondent for damages in Alabama state court. Petitioner alleged that respondent had slandered him[2] and had conspired with others to demote him

---

[1] Government records show that petitioner received $30,724.40 in back pay.

[2] Petitioner's defamation claim was based on a statement respondent made, when asked at the conclusion of a press conference, about petitioner's assertions that he had no meaningful work; respondent replied, "I have had [the] statement investigated and I can say unequivocally that such a statement has no basis in fact" (Pet. App. c1-5). The district court held that the defamation claim was precluded under *Barr* v. *Matteo*, 360 U.S. 564 (1959) (Pet. App. d-4 to d-11), and the court of appeals affirmed, both before and after this Court's remand (Pet. App. a-3, c1-6 to c1-10). This holding is not before the Court (Pet. Br. 3 n.1).

in violation of the First Amendment (Pet. App. d-2, d-4). Respondent removed the case to the United States District Court for the Northern District of Alabama, which granted respondent's motion for summary judgment. The district court held that because of petitioner's "administrative review opportunities and the importance of the government's interests in promoting the efficiency and integrity of its public services" (*id.* at d-16), petitioner could not maintain an action for damages under the Constitution.

The court of appeals affirmed, agreeing with the district court that petitioner did not have a constitutional cause of action for damages. The court of appeals cited the elaborate civil service remedies available to petitioner and observed that in *Davis* v. *Passman*, 442 U.S. 228 (1979), the absence of an alternative remedy was central to this Court's decision to find an implied cause of action for damages under the Constitution (Pet. App. c1-10 to c1-14). This Court then granted a petition for a writ of certiorari, vacated the court of appeals' judgment, and remanded the case for further consideration in light of the intervening decision in *Carlson* v. *Green*, 446 U.S. 14 (1980) (Pet. App. b-1; 446 U.S. 914 (1980)).

On remand, the court of appeals again affirmed the district court's decision. Citing *Carlson* v. *Green*, *supra*, 446 U.S. at 18, and *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971), the court of appeals stated that it would not confer on petitioner a damages remedy implied directly under the Constitution if there were "special factors counselling hesitation" in finding such a remedy, and it ruled that such factors are present here. Specifically, the court found "the unique relationship between the Federal Government and its civil service employees" to be such a special factor (Pet. App. a-6). The court of appeals explained that "[t]he role of the Government as an employer toward its employees is fundamentally different from its role as sovereign over private citizens generally" (*id.* at a-6 to

a-7). In this connection, the court of appeals noted the numerous cases in which this Court has emphasized the importance of according the government great latitude in the management of " 'its personnel and internal affairs' " (*ibid.*, quoting *Arnett* v. *Kennedy*, 416 U.S. 134, 168 (1974) (opinion of Powell, J.)).

The court of appeals also emphasized that its refusal to allow an implied personal damages action would not leave petitioner without a remedy (Pet. App. a-11 to a-12). The court observed that "Congress, rather than the courts, has traditionally carried the burden of regulating the Government employer-employee relationship" (*id.* at a-8 to a-9). The court described the series of statutes in which Congress has provided remedies for aggrieved civil servants (*ibid.*) and noted the administrative remedies petitioner successfully pursued and the judicial remedy that would have been available if petitioner had not been successful before the Civil Service Commission (*id.* at a-9). Pointing out that the civil service remedies were the product of continual congressional "fine tuning," the court explained (*id.* at a-9 to a-10):

> Congress has sought to achieve a proper balance between promoting governmental efficiency and protecting the rights of employees aggrieved by improper personnel action. * * * We * * * emphasize the care Congress has taken to carefully balance the employee's rights as a citizen with the Government's interest in the efficient conduct of the nation's business.

And the court noted that "[t]he very comprehensiveness of the legislative and administrative scheme evinces Congress' awareness of the special relationship and of the Government's responsibilities toward its civil service employees" (*id.* at a-10).

Allowing petitioner the damages remedy he sought, the court said, might "provide a disincentive for Congress to continue improving the mechanisms by which an aggrieved employee can protect his rights" (Pet. App. a-11). In any event, such a remedy would "interfere with

and undermine the traditional control of the Government over its internal and personnel affairs. It might encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the Government of the opportunity to work out its personnel problems within the framework it has so painstakingly established" (*id.* at a-10 to a-11).

SUMMARY OF ARGUMENT

A. In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court held that a plaintiff who alleges that his constitutional rights have been violated may sue the responsible federal officials for damages, even though Congress has not explicitly established such a remedy. In each case in which the Court has allowed a *Bivens* action, however, it has ensured that it was not acting in a fashion inconsistent with Congress's intent. In particular, the Court has allowed a *Bivens* action only after concluding either that Congress had not addressed the question of how to remedy a particular category of constitutional violations, or that Congress had resolved that question in a way that presupposed a judicially created damages remedy.

In this respect, *Bivens* and its progeny are faithful to the principle—well established in other areas where federal courts have acted in the absence of explicit congressional authority—that when Congress addresses a remedial problem in a way that reflects its intention to occupy the field, that intention must be honored. *Bivens* recognized this principle by stating that an alternative remedy, equally effective in the view of Congress, precludes an implied personal damages action (403 U.S. at 397). Moreover, *Bivens* expressly acknowledged that in some contexts—where there are "special factors counselling hesitation in the absence of affirmative action by Congress" (*id.* at 396)—a court should not afford a traditional judicial remedy even if Congress has not specifically addressed the remedial problem.

The civil service remedies that were available to petitioner, and that he successfully invoked, not only were fully adequate to redress a constitutional violation but reflected Congress's intent to occupy the field in a way that precludes a judicially created *Bivens* remedy. Moreover, special factors arising from the federal employment relationship require, at a minimum, that any doubts be resolved in favor of the preclusive effect of the civil service remedies.

B. 1. Congress has specifically addressed the question of what remedy to afford a civil servant who, like petitioner, complains of an unlawful personnel action. Congress has established an elaborate and integrated remedial scheme, consisting of two levels of administrative consideration followed by judicial review. These remedies are designed to provide full compensation to any federal employee who is the victim of an unconstitutional personnel action.

By providing for judicial review and full compensatory relief, these civil service remedies plainly meet, and exceed, any minimum requirements of adequacy derived from the Constitution itself. Indeed, the civil service remedies are superior to the *Bivens* remedy sought by petioner in several important respects.

Petitioner nonetheless contends that these civil service remedies created by Congress must be supplemented by a personal damages remedy that Congress did not expressly create. Petitioner's principal argument appears to be that the civil service remedies cannot preclude a *Bivens* remedy because the latter arguably provides more of a deterrent and is more favorable to claimants in certain ways—by allowing a recovery against an individual instead of the government, jury trials, and awards of punitive damages. But the assumption that Congress can preclude a *Bivens* action only by providing a remedy that is identical to a *Bivens* remedy (or even more favorable to plaintiffs) is manifestly implausible, and is inconsistent with previous decisions of this Court. See *Brown* v. *General Services Administration*, 425 U.S. 820 (1976). *Biv-*

ens did not hold that punitive damages or personal liability are constitutionally required, and if Congress provides a more complex or refined remedy, and intends that remedy to occupy the field, Congress's intent must control—even if its remedy is in some respects less favorable to claimants.

2. Both the structure and the history of the civil service remedies demonstrate that Congress did not envision that courts would supplement them with judicially created remedies. The civil service remedies are a "careful blend of administrative and judicial enforcement powers" (*Brown* v. *General Services Administration*, *supra*, 425 U.S. at 833) that assign a distinct role to the agency taking the adverse action, the Civil Service Commission, and the reviewing courts. Moreover, the history of the civil service remedies shows that Congress has revisited them repeatedly, fine-tuning the statutes and making adjustments when it perceived an inequity or a new problem. This close congressional superintendence of a complex remedial scheme strongly suggests that Congress took complete responsibility for providing a remedy and did not intend courts to create supplemental remedies Congress did not specifically prescribe.

Moreover, Congress plainly intended the civil service remedies to provide relief for constitutional violations. The impetus behind the Lloyd-LaFollette Act, the statutory basis of the civil service remedies petitioner successfully invoked, was congressional concern with federal employees' First Amendment rights. In general, the history of civil service legislation shows Congress's repeated concern with employees who expose abuses or mismanagement in the government—the precise activity in which petitioner alleges he was engaged—and Congress's strong institutional interest in protecting such employees.

3. When Congress enacted the civil service remedies, there was, of course, no *Bivens* remedy. Moreover, the longstanding tradition was that courts would play little or no role in resolving disputes growing out of civil service employment; the resolution of such disputes was uni-

versally understood to be the province of Congress and the executive branch. When Congress legislates against such a background, it cannot be presumed that Congress envisioned, or left room for, an active judicial role in providing supplemental remedies. Indeed, it should be presumed that Congress intended its remedy to be exclusive.

4. Allowing a personal damages action in this context, where Congress did not envision that one would be created, is not only inconsistent with Congress's intent; it will thwart important congressional policies reflected in the civil service remedies Congress created. Those remedies, as Congress has repeatedly explained, reflect a careful balance between protecting the rights of employees, on the one hand, and not making it unduly burdensome for managers to take needed adverse personnel actions, on the other. Because civil service managers often have little personal incentive to take such actions, this balance is fragile; if it becomes excessively difficult or burdensome for a manager to act, many simply will not act, and the efficiency and morale of the civil service will suffer.

It cannot be disputed that creating a personal damages remedy—which exposes every official who takes or approves an adverse personnel action to the risk of burdensome litigation under a threat of personal liability—will inhibit managers from taking personnel actions, including, necessarily, justified personnel actions. Of course, managers will be protected by the immunity doctrines that this Court has developed in other contexts to balance the rights of individuals against the societal need to allow uninhibited action by public officials. But this balance will be different from the balance Congress has painstakingly struck in the civil service context; and since the balance reflected in Congress's remedial scheme is plainly constitutional, the courts have no warrant to upset it.

C. 1. Certain distinctive aspects of the federal employment relationship suggest additional reasons for the courts to hesitate in creating a judicial remedy in this

context. First, an important premise of *Bivens* and its progeny was that courts historically have played a central role in protecting particularly vulnerable individuals and groups in society. Civil servants are not such a group; Congress has a direct interest in ensuring that the civil service is governed by fair and rational practices that promote efficiency and morale. Congress has an especially strong interest in protecting those who, like petitioner, criticize the performance of their agencies.

Moreover, the courts have been particularly alert to protect persons who, like Bivens himself, are confronted with the sovereign power of the federal government. But petitioner's relationship to the government is not the relationship of citizen to sovereign; in practical terms, it is little different from the relationship of employees to employers throughout society. Had a private employer demoted petitioner for his statements, the concrete effect on petitioner would have been little different, and petitioner would have had only contractual remedies. This does not mean, of course, that the government is not bound by the First Amendment in its dealings with its employees; but it does mean that those employees have less of a claim to special judicial protection and a judicially created remedy.

2. In a *Bivens* action, petitioner's claims would be considered de novo by a court. A consistent theme of federal labor policy, in the public and private sector alike, is that courts should, if possible, avoid addressing employment disputes in the first instance. Those disputes should instead be considered by specialized bodies that are well-versed in the peculiarities of the employment relationship, and judicial review should accordingly be limited. The civil service remedies enabled petitioner to obtain full compensatory relief in a way that is consistent with this traditional approach; the *Bivens* remedy that petitioner seeks is unnecessary to compensate him and would require courts to intrude into an area they traditionally have avoided.

ARGUMENT

A FEDERAL EMPLOYEE CHALLENGING A DEMOTION WHO CAN OBTAIN REINSTATEMENT AND BACK PAY THROUGH CIVIL SERVICE REMEDIES MAY NOT ALSO SEEK DAMAGES, UNDER AN IMPLIED CONSTITUTIONAL CAUSE OF ACTION, FROM AN OFFICIAL WHO APPROVED THE DEMOTION

A. Introduction

1. Although the Constitution establishes rights, it does not in general specify the remedy for violations of those rights. Congress and the courts, therefore, must prescribe remedies for constitutional violations; and it is axiomatic that unless the Constitution itself requires a particular form of relief, a federal court cannot provide a remedy unless it is authorized to do so, explicitly or implicitly, by statute. See, *e.g.*, *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 448-449 (1850); *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) (Marshall, C.J.) ("[T]he power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law.").

In *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court allowed a plaintiff to seek damages from federal officials for an alleged violation of his Fourth Amendment rights. The Court specifically noted that it was not holding that the Constitution itself required the creation of this remedy (*id.* at 397), and Congress had not explicitly authorized such relief. But the Court proceeded, in two steps, to reconcile its creation of a damages remedy with the principle that the power to create a remedy must be derived from a statute.

First, the Court noted that Congress had granted federal district courts general jurisdiction (28 U.S.C. 1331(a)) to entertain claims arising under the Constitution. See 403 U.S. at 396, quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946); 403 U.S. at 405 (Harlan, J., concurring). Second, the Court noted that Congress itself had

not prescribed a more specific remedy for Fourth Amendment violations; the defendants' contention was that state law was the appropriate source of a remedy. See 403 U.S. at 390, 397. Since Congress had not established a specific remedy—but had created courts with jurisdiction over the claim—the Court in *Bivens* concluded that federal courts were free to provide the remedies, including damages, that courts "[h]istorically" and "normally" have provided. See 403 U.S. at 395, 397; see also *id.* at 405, 408 n.8 (Harlan, J., concurring); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 261 (1951) (Frankfurter, J., dissenting) ("Courts, unlike administrative agencies, are organs with historic antecedents which bring with them well-defined powers. They do not require explicit statutory authorization for familiar remedies * * *.").

In *Davis* v. *Passman*, 442 U.S. 228 (1979), the Court followed *Bivens* and concluded that the plaintiff—who claimed that she had been discharged from her position as a congressional employee because of her sex, in violation of the Fifth Amendment—had an implied damages remedy under the Constitution. 442 U.S. at 241-242, 245. In *Davis*, unlike *Bivens*, there was a relevant statutory remedial scheme—Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, which provides a remedy for most acts of employment discrimination by the federal government. But the Court noted that Section 717 did not address the remedial question at issue in *Davis* itself; congressional employees are excluded from the coverage of Section 717 (see 42 U.S.C. 2000e-16(a)), and, the Court ruled, Congress did not intend this exclusion to leave congressional employees remediless by precluding them from invoking other remedies for unconstitutional employment discrimination. See 442 U.S. at 247; page 40 note 22, *infra*. The Court accordingly held that the plaintiff retained "the judicial remedies * * * [she] might otherwise possess" (442 U.S. at 247).

In *Carlson* v. *Green*, 446 U.S. 14 (1980), Congress unquestionably had addressed the remedial question. The

plaintiff—the survivor of a prisoner whose Eighth Amendment rights were allegedly violated by federal authorities—could have brought suit under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 2671 *et seq.*, for the wrongs asserted in the complaint. But the Court concluded, principally on the basis of legislative history that it described as "crystal clear" (446 U.S. at 20), that "Congress * * * contemplate[d] that victims of the kind of intentional wrongdoing alleged in [the] complaint shall have an action under FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights" (*ibid.*). See also *id.* at 19 n.5 ("Congress * * * view[ed the FTCA remedy] as fully adequate only in combination with the *Bivens* remedy.").

2. In each of these cases, the sole statutory source of the damages remedy was a grant of jurisdiction. In each case, before allowing the remedy, the Court ensured that Congress either had not addressed the question of what remedy to afford in a more specific fashion, or had addressed it in a way that did not occupy the field and therefore did not preclude an implied judicial remedy. In these respects, *Bivens* and its progeny resemble other forms of federal judge-made law—ordinarily described as federal common law—that are based solely on the authority of a jurisdictional grant. See, *e.g.*, *Fitzgerald* v. *United States Lines*, 374 U.S. 16, 20 (1963) (admiralty); *Kansas v. Colorado*, 206 U.S. 46 (1907) (suits between states in this Court's original jurisdiction); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957) (suits under Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. 185(a)).[3]

---

[3] See also *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corp.*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) ("Federal common law implements the federal Constitution and statutes"); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 798 (2d ed. 1973); Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 Harv. L. Rev. 1, 23-24 (1975).

In every area of federal common law, the Court has "consistently * * * emphasized that the federal lawmaking power is vested in the legislative, not the judicial branch of government; therefore, federal common law is 'subject to the paramount authority of Congress.' " *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 95-96 (1981), quoting *New Jersey* v. *New York*, 283 U.S. 336, 348 (1931). The Court has recently noted that "[e]ven in admiralty, * * * where the federal judiciary's lawmaking power may well be at its strongest, it is [the Court's] duty to respect the will of Congress." *Northwest Airlines, Inc.* v. *Transport Workers Union*, *supra*, 451 U.S. at 96. Consequently, should Congress prescribe a specific remedy for a category of constitutional violations, and intend that remedy to occupy the field in a way that preempts a *Bivens* remedy, Congress's intent is controlling. See *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 314 (1981) ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 722 (1949) (Frankfurter, J., dissenting) ("[T]he sovereign can constitutionally change the traditional rules of liability for the tort of the agent by providing a fair substitute.").[4]

It might be suggested that the *Bivens* remedy differs from other forms of federal common law because it protects constitutional rights. The special role of the courts in protecting constitutional rights was, indeed, a major element of the justification for the Court's decision in *Bivens* to infer authority to create a remedy from a grant

---

[4] See also Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1118 (1969) ("[T]he fact that a constitutional remedy has been judicially prescribed in the absence of legislation does not mean that the legislature lacks power to prescribe an adequate substitute."); Katz, *The Jurisprudence of Remedies: Constitutional Legality And The Law of Torts In Bell* v. *Hood*, 117 U. Pa. L. Rev. 1, 5 (1968).

of jurisdiction (see, *e.g.*, *Bivens*, *supra*, 403 U.S. at 407 (Harlan, J., concurring); *Davis* v. *Passman*, *supra*, 442 U.S. at 241-242), because "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640-641 (1981), citing *United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973). See, *e.g.*, *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938).

But the fact that a *Bivens* remedy involves constitutional rights does not alter the basic nature of the inquiry, which is whether allowing that remedy is consistent with Congress's intent.[5] Even assuming that the Constitution of its own force requires that there be some remedy for a violation of its provisions, *within* that constitutional limit there is no reason to deny Congress the power to prescribe remedies for constitutional violations as broad as its power to legislate on other subjects. See, *e.g.*, *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 250 (1845); Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1366-1367 (1953); compare *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), with *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868). Accordingly, while the inquiry into congressional intent necessarily takes into account every relevant factor (see *Brown* v. *General Services Administration*, 425 U.S. 820, 825 (1976), quoting *United States* v. *Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805))—including the status and importance of the rights involved and their claim to judicial solicitude (see pages 42-44, *infra*) —the question whether legislation preempts judge-made law must ultimately depend, in the *Bivens* area as elsewhere, upon whether Congress intended to occupy the

---

[5] Notably, the bodies of federal common law governing suits in admiralty and between the states also have a constitutional basis. See Article III, Section 2. See also *City of Milwaukee* v. *Illinois*, *supra*, 451 U.S. at 334-335 (Blackmun, J., dissenting) (discussing basis of federal common law of interstate nuisance that was held preempted by legislation).

field. See *City of Milwaukee* v. *Illinois*, *supra*, 451 U.S. at 338-339 & n.8 (Blackmun, J., dissenting).

In *Bivens* and its progeny, the Court has organized the inquiry into congressional intent by establishing two principles. First, recognizing that a judicially-created remedy would be inappropriate if Congress had specifically addressed the remedial question, the Court has ruled that it would not create an implied damages remedy if there exists "another remedy, equally effective in the view of Congress." *Bivens*, *supra*, 403 U.S. at 397; see *Carlson* v. *Green*, 446 U.S. at 19; *Davis* v. *Passman*, *supra*, 442 U.S. at 248. Second, recognizing that in some contexts Congress may not have intended its grant of federal question jurisdiction to serve as a basis for providing traditional judicial remedies, the Court has ruled that "special factors counselling hesitation in the absence of affirmative action by Congress" (*Bivens*, *supra*, 403 U.S. at 396; see *Carlson* v. *Green*, *supra*, 446 U.S. at 18; *Davis* v. *Passman*, *supra*, 442 U.S. at 245) preclude an implied damages action even if Congress has not established an alternative remedy.

We submit that the civil service remedies that were available to petitioner (and were successfully invoked by him) are an alternative remedy that bars a *Bivens* action. See *Bishop* v. *Tice*, 622 F.2d 349, 357 (8th Cir. 1980).[6] Moreover, there are special factors, incident to the federal employment relationship, that at a minimum require any doubts to be resolved in favor of the preclusive effect of the civil service remedies. See *Arnett* v.

[6] No circuit has resolved this issue adversely to our position. See also *Avitzur* v. *Davidson*, 549 F. Supp. 399 (N.D.N.Y. 1982); *Purtill* v. *Harris*, 658 F.2d 134 (3d Cir. 1981), petition for cert. pending, No. 81-1010 (filed Nov. 23, 1981); *Broussard* v. *United States Postal Service*, 674 F.2d 1103, 1112-1113 (5th Cir. 1982). Petitioner cites (Pet. Br. 22-23 n.10) *Sonntag* v. *Dooley*, 650 F.2d 904 (7th Cir. 1981), but we have explained (Br. in Opp. 11-12) why *Sonntag* is not in conflict with the court of appeals' decision in this case. We note in addition that on August 17, 1982, the Seventh Circuit granted rehearing en banc in *Egger* v. *Phillips*, 669 F.2d 497 (1982), apparently to reconsider this issue.

Kennedy, 416 U.S. 134, 168 (1974) (opinion of Powell, J.) ("[T]o perform its responsibilities effectively and economically, * * * the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs."); *Sampson* v. *Murray*, 415 U.S. 61, 83 (1974), quoting *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896 (1961) ("the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs'").

B. The Civil Service Remedies Available to Petitioner Precluded an Implied Constitutional Damages Action

Plainly this is not a case like *Bivens* itself, in which Congress had not specifically addressed the remedial question; Congress and agencies acting pursuant to its authority have established an administrative and judicial remedial scheme for civil servants challenging personnel actions. Nor is this a case like *Davis* v. *Passman*, in which the particular claimant was excluded from a comprehensive remedy; petitioner successfully invoked the civil service remedies. Instead, the question here is whether the civil service remedies explicitly established by Congress should be supplemented by a judicially-created personal damages remedy that Congress has not expressly authorized.

1. The Differences Between the Civil Service Remedies and the Implied Damages Remedy Do Not Require That Petitioner Be Allowed To Bring a Damages Action

Under the Lloyd-LaFollette Act, 5 U.S.C. 7501(a), petitioner could not be demoted "except for such cause as will promote the efficiency of [the civil] service." See 5 C.F.R. 752.104(a) (1975). See also 5 U.S.C. (Supp. V) 7513(a). This standard prohibits adverse actions that violate the First Amendment (*Arnett* v. *Kennedy*, 416 U.S. 134, 162 (1974) (opinion of Rehnquist, J.); *id.* at 164 (opinion of Powell, J.); *id.* at 177 (opinion of White, J.)); indeed, the principal and express concern of the Congress that first enacted this standard was to protect

the First Amendment rights of civil servants (see page 30, *infra*). As we have noted, the Civil Service Commission's Federal Employee Appeals Authority and Appeals Review Board both considered petitioner's First Amendment claims specifically and in detail; the Appeals Review Board reopened the case to consider them, and ruled in his favor. Had petitioner not prevailed before the administrative agencies, a reviewing court would have been required to set aside an unconstitutional personnel action (see page 20, *infra*). There is no question, therefore, that the civil service remedies were capable of correcting a constitutional violation.

These remedies consisted of elaborate administrative proceedings, followed by judicial review. Petitioner was entitled to receive written notice of the reasons for the proposed adverse action and to examine all disclosable materials that formed the basis of the proposed action. 5 C.F.R. 752.202(a)(1975). He then had the right to answer the charges and to "make any representations which [he] believe[d] might sway the final decision on his case" (5 C.F.R. 752.202(b)(1975)) before agency officials empowered either to make or to recommend a decision on the proposed action. The final agency decision was to be "made by a higher level official of the agency * * * than the officer who proposed the adverse action." 5 C.F.R. 752.202(f)(1975). Here, as we have noted, an official below respondent who is not a party proposed petitioner's removal, and respondent, who was required to review that proposal, authorized only petitioner's demotion.

Petitioner was then entitled to appeal to the Civil Service Commission's Federal Employee Appeals Authority. 5 C.F.R. 752.203 and 772.101 (1975). The burden in Commission proceedings was on NASA to sustain its action, not on petitioner. See *Bishop* v. *Tice*, *supra*, 622 F.2d at 357 n.15. The Appeals Authority held a trial-type hearing, at which petitioner had the opportunity to present witnesses and cross-examine other witnesses, and to require the attendance of NASA officials except in limited cir-

cumstances. 5 C.F.R. 772.307(c) (1975). Rules of evidence are not strictly applied at this hearing. 5 C.F.R. 772.307(c) (1975). Petitioner also had, and successfully invoked, the right to ask the Commission to reopen an adverse decision. 5 C.F.R. 772.310 (1975).

In addition, petitioner was entitled to seek judicial review of an adverse Commission decision by filing suit in federal district court or in the Court of Claims. See generally Johnson & Stoll, *Judicial Review of Federal Employee Dismissals and Other Adverse Actions*, 57 Cornell L. Rev. 178, 179-182, 185-186 (1972) (citing cases). The Commission's decision was reviewed on the record (see, *e.g.*, *Twiggs* v. *Small Business Administration*, 541 F.2d 150, 152 (3d Cir. 1976)) and could be set aside if it was arbitrary and capricious, unsupported by substantial evidence, legally erroneous, or the product of a failure to follow proper procedures.[7] When he prevailed, petitioner was entitled to reinstatement with full back pay.[8]

This remedial scheme was fully adequate to protect petitioner's rights not to be discharged or demoted in violation of the Constitution. Indeed, in many respects, these civil service remedies were more favorable to petitioner than a *Bivens* action: he did not bear the burden of proof, as he would in a *Bivens* suit; he did not have to overcome an immunity defense in order to prevail (see *Butz* v. *Econo-*

---

[7] See, *e.g.*, *Young* v. *Hampton*, 568 F.2d 1253, 1256-1257 (7th Cir. 1977); *Bielec* v. *United States*, 456 F.2d 690, 695 (Ct. Cl. 1972); *Armstrong* v. *United States*, 405 F.2d 1275, 1277 (Ct. Cl.), cert. denied, 395 U.S. 934 (1969); *Toohey* v. *Nitze*, 429 F.2d 1332, 1334 (9th Cir. 1970), cert. denied, 400 U.S. 1022 (1971); *Charlton* v. *United States*, 412 F.2d 390, 395 (3d Cir. 1969); *Vigil* v. *Post Office Department*, 406 F.2d 921, 924 (10th Cir. 1969); *Dabney* v. *Freeman*, 358 F.2d 533, 535 (D.C. Cir. 1965); *Jenkins* v. *Macy*, 237 F. Supp. 60, 62 (E.D. Mo. 1964), aff'd, 357 F.2d 62 (8th Cir. 1966).

[8] After petitioner brought this *Bivens* action, Congress enacted the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. The Act revised the available remedies, but it preserved their basic structure. We describe the CSRA remedies at pages 32-33, *infra*.

mou, 438 U.S. 478 (1978)); his relief included reinstatement, which a *Bivens* remedy could not; and the procedures were more informal and less costly than a lawsuit.[9]

Petitioner asserts, however, that courts must provide a *Bivens* remedy because it differs from the civil service remedies in three additional respects. See, *e.g.*, Pet. Br. 23-29. First, if a claimant successfully pursues his civil service remedies, he recovers from the government; in a *Bivens* action, he recovers from the defendant official personally. Second, the civil service remedies provide for agencies to adjudicate the claim in the first instance, subject to limited judicial review; a *Bivens* claim is tried de novo by a court, and the plaintiff can request a jury (see *Carlson* v. *Green*, *supra*, 446 U.S. at 22). Third, punitive damages are apparently available in a *Bivens* action (*Carlson* v. *Green*, *supra*, 446 U.S. at 22) but cannot be recovered through the civil service remedies.[10]

Instead of analyzing Congress's intent, however, petitioner appears to argue that the civil service remedies cannot preclude a *Bivens* action because they differ from a *Bivens* remedy in these ways and therefore are, according

---

[9] An empirical study found that in 1970 approximately one-half of those employees who appealed reductions in grade or pay to the Civil Service Commission were successful. In addition, approximately one-fourth of those who challenged their demotions before the agency were successful. See Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 Va. L. Rev. 196, 204 n.35 (1973).

[10] Petitioner also asserts (*e.g.*, Pet. Br. 24-26) that he can receive a larger compensatory award in a *Bivens* action. In view of Congress's explicit determination that the award provided under the Back Pay Act of 1966, 5 U.S.C. (& Supp. V) 5596 (the statute that authorized the monetary award to petitioner), fully compensates aggrieved employees (see pages 31-32, *infra*), this claim seems plainly incorrect. In addition, we see no basis for petitioner's repeated claim (Pet. Br. 14, 24, 25, 26) that he could receive, as part of his recovery in a *Bivens* suit, the attorney's fees he incurred in pursuing the civil service remedy. Cf. *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54 (1980).

to petitioner, less favorable to claimants and less of a deterrent.[11] See, *e.g.*, Pet. Br. 14, 16, 27-29. This argument purports to be based on *Carlson* v. *Green*, *supra*, but in *Carlson* the Court examined the differences between a *Bivens* action and the alternative FTCA remedy only to determine if they "support[ed the] conclusion that Congress did not intend to limit [a claimant] to an FTCA action." 446 U.S. at 20-21.[12] Moreover, petitioner's argument is plainly inconsistent with *Brown* v. *General Services Administration*, 425 U.S. 820 (1976), where the Court held that Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, is the exclusive remedy for employment discrimination by the federal government. Under *Brown*, a federal employee may not bring a *Bivens* action alleging unconstitutional employment discrimination if he has a remedy under Section 717. See *Davis* v. *Passman*, *supra*, 442 U.S. at 247 n.26; *Gissen* v. *Tackman*, 537 F.2d 784 (3d Cir. 1976) (en banc).[13] Title VII remedies for civil service actions based on impermissible factors such as race or sex are in many ways similar to the civil service remedies petitioner invoked. In particular, a Title VII plaintiff who prevails recovers from the gov-

---

[11] The civil service remedies, of course, do not fail to provide a deterrent; a manager may be disciplined for taking improper actions. The Civil Service Reform Act of 1978 provides a specific disciplinary system for managers who violate their subordinates' constitutional rights. See page 33, *infra*.

[12] In addition, one of the differences between a *Bivens* action and an FTCA action that the Court considered significant in *Carlson* was that "an action under FTCA exists only if the State in which the alleged misconduct occurred would permit a cause of action for that misconduct to go forward * * * [while] the liability of federal officials for violations of citizens' constitutional rights should be governed by uniform rules." 446 U.S. at 23. See also *id.* at 28 & n.1 (Powell, J., concurring in the judgment). Civil service remedies, of course, do not vary with state law but are governed by federal standards.

[13] See also *Purtill* v. *Harris*, 658 F.2d 134 (3d Cir. 1981), petition for cert. pending, No. 81-1010 (filed Nov. 23, 1981).

ernment, not an individual, and cannot obtain punitive damages (42 U.S.C. 2000e-5(g), 2000e-16(c)), and there is no right to a jury trial under Title VII (see *Lehman* v. *Nakshian*, 453 U.S. 156, 164 (1981)).

In any event, the assumption on which petitioner's argument rests—that an alternative remedy cannot preclude a *Bivens* remedy unless it is equally or more favorable to claimants—is obviously implausible. In repeatedly recognizing that Congress may preclude a *Bivens* remedy by enacting a substitute remedy that is "equally effective in the view of Congress," the Court could not have meant that Congress may create only a statutory remedy identical to (or more favorable to plaintiffs than) a *Bivens* action.[14] A compensatory remedy against the government is surely more than is needed to satisfy the Constitution itself; we know of no case holding that the Constitution requires officials to be punished for unconstitutional acts. See *Bivens*, *supra*, 403 U.S. at 397.[15] Indeed, the Court has squarely rejected the argument that a remedy for government misconduct does not satisfy minimum constitutional requirements unless it provides for personal liability, a jury trial, and punitive damages; "remedies * * * [that] could have fully compensated [a claimant] for the * * * loss he suffered * * * are sufficient to satisfy the requirements of due process." *Parratt* v. *Taylor*, 451 U.S. 527, 543-544 (1981).

---

[14] See *Tarpley* v. *Greene*, 684 F.2d 1, 11 n.24 (D.C. Cir. 1982) (Edwards, J.) ("We do not believe the Court in *Bivens* meant, by using the word 'equally effective,' that federal courts could expand an implied cause of action under the Constitution in order to circumvent the remedy prescribed by Congress simply because Congress saw fit to limit that remedy in some fashion.").

[15] See also Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 85-89 & n.212 (1981) ("[T]he adequacy of remedies for constitutional wrongs should turn on the question whether a litigant is protected or made whole, and should not embrace deterrence concerns, over which the legislature should enjoy considerable discretion.").

It cannot seriously be contended, for example, that Congress would violate the Constitution if it enacted a statute prohibiting the award of punitive damages in *Bivens* actions and establishing a mechanism to indemnify federal officials found liable in *Bivens* actions—even though the effect of such a statute would be to leave claimants with a compensatory remedy against the government. There is no reason to require a different result if Congress instead affirmatively enacts a compensatory remedy against the government and reveals its intention to preclude a *Bivens* action. See *City of Milwaukee* v. *Illinois*, *supra*, 451 U.S. at 324 (footnote omitted) ("The question is whether the field has been occupied, not whether it has been occupied in a particular manner.").

The *Bivens* remedy was not selected as a benchmark that all other remedies must meet; as the opinions in *Bivens* explain, it was selected because it is a traditional judicial remedy, and a court acting under the sole authority of a jurisdictional grant cannot exceed the traditional understanding of a court's powers. But a legislature can be more creative; it can design a more complex and refined remedial scheme, or it can establish administrative agencies and empower them to do so. "Congress is not confined to traditional forms or traditional remedies. * * * In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or restrict." *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240 (1937).

At bottom, petitioner's argument that he must be allowed a *Bivens* remedy because it will provide a larger possible recovery and a supposedly better deterrent fails to recognize that every remedial scheme reflects a particular balance of competing interests. As the court of appeals indicated (Pet. App. a-8 to a-10), an award of damages against individual officials may deter some wrongdoing, but it also greatly increases the risk of "overdeterrence" (see *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, *supra*, 451 U.S. at 637)—inhibiting officials from taking justified actions in the public interest because they fear they will face litigation and the threat

of personal liability. See *Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982), slip op. 13, quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950); Landes & Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1 (1975). Similarly, a remedial scheme that allows a specialized agency instead of a court and jury to resolve a dispute in the first instance may lose some of the benefits of judicial independence—although the loss is minimal when, as here, the agency's action is subject to judicial review—but it gains the advantages of the agency's expertise and familiarity with the employment situation.

Within the limits set by the Constitution, it is for Congress to strike the proper balance; if Congress strikes a particular balance that the Constitution permits, the courts have no warrant to upset it. See *Northwest Airlines, Inc.* v. *Transport Workers Union*, *supra*, 451 U.S. at 97-98, citing *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 826 (1980); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 623 (1978).[16] In *Bivens*, *Davis*, and *Carl-*

---

[16] See also Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532, 1549 (1972) ("Congress should be free to revise with an adequate alternative any remedy which is not determined by the Court to be indispensable but which is merely selected by the Court as one appropriate method of carrying into effect a substantive constitutional right."). For example, 42 U.S.C. (Supp. IV) 1983 does not permit a damages action against a municipality on a respondeat superior theory, although it permits a suit against the officials themselves. See *Monell* v. *Department of Social Services*, 436 U.S. 658, 691-694 (1978). The courts of appeals have unanimously held that a plaintiff does not have an implied constitutional damages action against a municipality on a respondeat superior theory—even though such an action, against a wealthier defendant likely to arouse less jury sympathy, would undoubtedly give a plaintiff a better prospect of recovery. See, *e.g.*, *Tarpley* v. *Greene*, 684 F.2d 1, 9-11 (D.C. Cir. 1982); *Ellis* v. *Blum*, 643 F.2d 68, 85 (2d Cir. 1981); *Dean* v. *Gladney*, 621 F.2d 1331, 1334-1337 (5th Cir. 1980), cert. denied, 450 U.S. 983 (1981); *Jones* v. *City of Memphis*, 586 F.2d 622, 624-625 (6th Cir. 1978), cert. denied, 440 U.S. 914 (1979); *Molina* v. *Richardson*, 578 F.2d 846, 847-854 (9th Cir.), cert. denied, 439 U.S. 1048 (1978). See also *Bishop* v. *Tice*, *supra*,

son, the Court created an implied remedy only after determining either that Congress had not struck a particular balance or, in *Carlson*, that the balance Congress struck presupposed a personal damages remedy. For these reasons, a remedy prescribed by Congress should be regarded as "equally effective in the view of Congress," and therefore as precluding a *Bivens* remedy, when Congress deems it as effective in achieving the proper balance of the competing interests—not just in promoting those interests that favor the plaintiff.

2. *The Complexity of the Civil Service Remedies, and Their Frequent Adjustment, Reflect Congress's Intent to Occupy the Field*

The civil service remedies available to petitioner were prescribed or authorized by statutes enacted before *Bivens* was decided. See pages 29-32, *infra*. It is therefore pointless to seek an explicit expression of legislative intent to preclude a *Bivens* remedy.[17] Congress had no reason to believe that there were any other possible remedies available to civil servants; it thus had no reason to address the question of whether the remedies it prescribed were exclusive. Consequently, in order to determine whether a *Bivens* remedy should be created, the Court must examine other indicia of legislative intent—the structure of the civil service remedies, the presuppositions about the judicial role that existed when they were enacted, and Congress's care in shaping the remedies—to determine whether Congress intended to occupy the field in a way that leaves no room for judicially-created remedies.

---

622 F.2d at 356 n.12; *Cale* v. *City of Covington*, 586 F.2d 311, 317-318 (4th Cir. 1978); *Mahone* v. *Waddle*, 564 F.2d 1018, 1024-1025 (3d Cir. 1977).

[17] We believe, however, that the legislative history of the first civil service legislation passed after *Bivens*—the Civil Service Reform Act of 1978—does contain what amounts to a clear statement that Congress did not intend *Bivens* remedies to be conferred. See pages 40-41 note 22, *infra*.

The Court has frequently recognized that "when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement," it very likely intended to exclude other remedies. *Northwest Airlines, Inc.* v. *Transport Workers Union*, *supra*, 451 U.S. at 97. See also *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, *supra*, 451 U.S. at 645; *Universities Research Association, Inc.* v. *Coutu*, 450 U.S. 754, 773 & n.24 (1981). In *City of Milwaukee* v. *Illinois*, *supra*, the Court held that the federal common law of interstate water pollution, which has a quasi-constitutional character (see page 16 note 5, *supra*), was preempted by the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (& Supp. IV) 1251 *et seq.*, because the Amendments established "a comprehensive regulatory program supervised by an expert administrative agency." 451 U.S. at 317. In *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1, 19-21 (1981), the Court ruled that a "comprehensive enforcement mechanism[]" precluded previously existing, open-ended judicial authority to provide a remedy even though that authority derived from a statute—42 U.S.C. (Supp. IV) 1983, as interpreted in *Maine* v. *Thiboutot*, 448 U.S. 1 (1980)—and therefore raised no questions about the courts' exceeding their proper role. See Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. Chi. L. Rev. 394 (1982).

Most salient, however, is *Brown* v. *General Services Administration*, *supra*, which, as we have noted, established that a federal employee may not bring a *Bivens* action alleging unconstitutional employment discrimination if he has a remedy under Section 717 of the Civil Rights Act of 1964. The holding in *Brown* rests in large measure on the Court's conclusion that Section 717 is a "careful and thorough remedial scheme" that "provides for a careful blend of administrative and judicial enforcement powers" (425 U.S. at 833). "The balance, completeness, and structural integrity of [the remedy] are inconsistent with the * * * contention that

the * * * remedy * * * was designed merely to supplement other putative judicial relief" (*id.* at 832).

Judged by these standards, the Civil Service remedies available to petitioner plainly precluded a judicially created damages remedy. The civil service remedies, on their face, reflect a careful distribution of functions between the agency concerned and the Civil Service Commission, with the courts playing a reviewing role. Congress intended to allow adverse personnel actions to be taken relatively expeditiously, with more careful consideration by the Commission, and then the courts, to follow. See *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 168 (opinion of Powell, J.); *Sampson* v. *Murray*, *supra*, 415 U.S. at 74-75. But Congress also legislated specific procedural safeguards for the employee, even at the agency level. See 5 U.S.C. 7501(b). This "careful blend of administrative and judicial enforcement powers" (*Brown* v. *General Services Administration*, *supra*, 425 U.S. at 835) in a "detailed and specific" remedial scheme (*Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, *supra*, 451 U.S. at 644) that is "supervised by an expert administrative agency" (*City of Milwaukee* v. *Illinois*, *supra*, 451 U.S. at 317) strongly suggests that Congress did not envision, or leave room for, an active judicial role in providing supplemental remedies.

Moreover, as the court of appeals noted (Pet. App. a-8 to a-10), Congress addressed itself to the civil service remedies repeatedly, making adjustments when it perceived an inequity or was faced with a new problem. This frequent fine-tuning demonstrates that Congress took on itself the responsibility for "superintendence of the field" of civil servants' remedies (*Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 142 (1963)); Congress was "careful and thorough" in ensuring the "balance, completeness, and structural integrity" (*Brown* v. *General Services Administration*, *supra*, 425 U.S. at 833, 832) of this remedy. This, too, reflects Congress's strong presupposition that the courts would not play an active role in creating additional remedies that Congress or the executive branch did not provide.

a. Congress's first significant effort to regulate the selection and tenure of federal employees was the Pendleton Act of 1883 (Act of Jan. 16, 1883, ch. 27, 22 Stat. 403). This statute was in large measure the product of opposition to the "spoils system," under which employees were hired and fired because of their political affiliation. See R. Vaughn, *Principles of Civil Service Law* 1-3 to 1-18 (1976). The Act required competitive examinations for classified positions (Section 1, 22 Stat. 403) and specified that no person in the classified service was to be "removed or otherwise prejudiced" for refusing to engage in political activity (Section 2, 22 Stat. 404). In enacting the Pendleton Act, Congress declared its intention to "pursue[] a middle course" between "life tenure of appointees [and] removals at the will of the appointing power" (H.R. Rep. No. 1826, 47th Cong., 2d Sess. 1 (1882)) and expressed hope that experience under the Act would reveal "how much further it will be both safe and expedient to go" (*ibid.*).

The Pendleton Act also established the Civil Service Commission, required that it be bipartisan, and authorized it "[t]o aid the President * * * in preparing suitable rules for carrying this act into effect" (Section 2, 22 Stat. 403). In 1897, President McKinley issued a civil service rule providing that "[n]o removal shall be made from any position subject to competitive examination except for just cause and upon written charges * * * of which the accused shall have full notice and an opportunity to make defense." See *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 149 n.19 (opinion of Rehnquist, J.). In 1912, Congress enacted the Lloyd-LaFollette Act, which codified and expanded on this civil service rule. Act of Aug. 24, 1912, ch. 339, Section 6, 37 Stat. 555. That act prohibited an employee from being removed from a classified position except "for such cause as will promote the efficiency of [the civil] service * * *." It also required that employees be given written notice of the charges against them and a reasonable time to respond.

b. The legislative history of the Lloyd-LaFollette Act shows that at the time it was enacted, Congress was concerned with "gag orders" issued by Presidents Taft and Roosevelt that prohibited federal employees from "directly or indirectly, individually or through associations, * * * influenc[ing] or attempt[ing] to influence in their own interest any * * * legislation whatever, either before Congress or its committees, or in any way save through the heads of the departments * * * under which they serve, on penalty of dismissal from the Government service." 48 Cong. Rec. 4513 (1912); *id.* at 5223; see, *e.g.*, *id.* at 4653 (remarks of Rep. Calder); *id.* at 5637 (remarks of Rep. Wilson); *id.* at 10730 (remarks of Sen. LaFollette). In response to the gag orders, the Lloyd-LaFollette Act, in addition to providing procedural guarantees, protected the "right of persons employed in the civil service * * * to furnish information to either House of Congress, or to any committee or member thereof * * *."

In urging the adoption of the Lloyd-LaFollette Act, members of Congress asserted that federal employees' constitutional rights—specifically their First Amendment rights—were at stake. See, *e.g.*, 48 Cong. Rec. 4738 (1912) (remarks of Rep. Blackmon); *id.* at 5201 (remarks of Rep. Prouty); *id.* at 5223 (remarks of Rep. O'Shaunessy); *id.* at 5635 (remarks of Rep. Lloyd); *id.* at 10673 (remarks of Sen. Reed) (quoting First Amendment); *id.* at 10732, 10799 (remarks of Sen. LaFollette); *id.* at 10803 (remarks of Sen. Williams). They explained that the gag orders, and the threat to civil servants' First Amendment rights, were a principal reason for all of the protections of the Lloyd-LaFollette Act—including the procedural requirements. See, *e.g.*, 48 Cong. Rec. 4653 (1912) (remarks of Rep. Calder); *id.* at 5207 (remarks of Rep. Konop); *id.* at 5638 (remarks of Rep. Wilson); *id.* at 10675 (exchange among Sens. Reed, Cummins, and Bristow); *id.* at 10795 (remarks of Sen. Smith).

c. The procedural protections granted by the Lloyd-LaFollette Act were themselves expanded step-by-step.

The Veterans Preference Act of 1944 (Act of June 27, 1944, ch. 287, Section 14, 58 Stat. 391), 5 U.S.C. 7501 and 7512, extended the basic Lloyd-LaFollette protections to "adverse actions," required that the employee be allowed to respond orally and in writing, and established the right to an appeal from an agency action to the Civil Service Commission—but only for veterans. The Back Pay Act of 1948 (Act of June 10, 1948, ch. 447, 62 Stat. 354), extended the protections against removal contained in the original Lloyd-LaFollette Act to all employees in the competitive service who were suspended without pay. Executive Orders (Exec. Order No. 10988, 27 Fed. Reg. 551 (1962); Exec. Order No. 11491, 34 Fed. Reg. 17605 (1969)) extended the right to an appeal to all employees in the competitive service, and made the administrative remedy applicable to all adverse actions. Civil Service Commission regulations (5 C.F.R. 772.307 (1975)) provided for a trial-type hearing before the Commission.

Similarly, Congress adjusted, step by step, the compensation available to a civil servant found to have been wrongfully discharged, suspended, or demoted. Before 1948, back pay was not generally available even to those who successfully invoked their civil service remedies. See H.R. Rep. No. 1436, 80th Cong., 2d Sess. 3 (1948). The Back Pay Act of 1948 amended the Lloyd-LaFollette Act to permit back pay awards to victims of improper reductions in force, and to nonveterans in the competitive service and all nonprobationary veterans who were improperly removed or suspended.

In the Back Pay Act of 1966, which authorized the award of back pay to petitioner, Congress closed the remaining gaps. See *United States* v. *Testan*, 424 U.S. 392, 405-406 (1976). The Back Pay Act of 1966 is a "broad remedy * * * [providing] full compensation" (*Sampson* v. *Murray*, *supra*, 415 U.S. at 82-83); its legislative history shows that it was intended to be "perfecting legislation" (S. Rep. No. 1062, 89th Cong., 2d Sess.

4 (1966)) that "establishe[d] on a uniform basis the principle that a Government officer or employee is entitled to pay or benefits lost as a result of a personnel action which subsequently is found to be unjustified" (*id.* at 3). The legislative history also shows that Congress considered the relief provided by the Act sufficient to "put[] the employee in the same position he would have been in had the unjustified or erroneous personnel action not taken place." *Id.* at 1. See also H.R. Rep. No. 32, 89th Cong., 1st Sess. 5 (1965) (Back Pay Act "establishes and applies * * * the principle that a Government officer or employee should be made whole following the correction of an unjustified or unwarranted personnel action. * * * This adjustment will cover everything to which such officer or employee normally would have been entitled if the personnel action had not occurred."); 111 Cong. Rec. 2476 (1965) (remarks of Rep. Beckworth).

d. These were the statutes in force when petitioner was demoted. Subsequently, Congress again considered the question of civil service remedies and revised them in the Civil Service Reform Act of 1978 (CSRA). CSRA remedies were not available to petitioner, and we do not invoke the Act as part of the alternative remedy that precludes petitioner's *Bivens* action. But the CSRA is instructive because it reveals that Congress continued its concern with the details of the civil service remedies. The CSRA also reveals continuities in the problems Congress perceived, and in the structure of the remedies it provided to deal with them.

The CSRA divided the functions of the Civil Service Commission between the Office of Personnel Management and the Merit Systems Protection Board; the Board succeeded to the Commission's adjudicative functions. 5 U.S.C. (Supp. V) 1205 and 7701. In disciplinary cases, the agency taking an adverse action again bears the burden of persuasion before the Board. 5 U.S.C. (Supp. V) 7701(c). The Board's decisions are reviewable, on the record, by the United States Court of Appeals for the Federal Circuit. 5 U.S.C. (Supp. V) 7703; Federal Courts

Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. Like Civil Service Commission decisions, they may be set aside if they are unsupported by substantial evidence, arbitrary or capricious, or "otherwise not in accordance with law" (5 U.S.C. (Supp. V) 7703(c)(1)).

Notably, the Congress that enacted the CSRA, like the Congress that enacted the Lloyd-LaFollette Act, was particularly concerned to protect "whistleblowers"—employees threatened with adverse action because they revealed agency mismanagement or abuse. See 5 U.S.C. (Supp. V) 2302(b)(8)(A); H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 386-387 (1978); S. Rep. No. 95-696, 95th Cong., 2d Sess. 8 (1978). The CSRA established the Office of the Special Counsel and empowered it to investigate charges of prohibited personnel practices, including retaliation for whistleblowing or any other violation of an employee's constitutional rights. 5 U.S.C. (Supp. V) 1206. If the Special Counsel finds reasonable grounds to believe that a prohibited personnel practice has occurred, and the agency does not take corrective action, the Special Counsel may initiate a proceeding before the Board to seek such action. 5 U.S.C. (Supp. V) 1206(c)(1)(A) and (B). The Special Counsel also has the authority to initiate disciplinary proceedings before the Board against a manager guilty of a prohibited personnel practice. 5 U.S.C. (Supp. V) 1206(g). The Board may discipline such a manager by ordering "removal, reduction in grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed $1,000." 5 U.S.C. (Supp. V) 1207(b).[18]

---

[18] Amici Schroeder, *et al.*, urge (Br. 14) that by enacting these protections, Congress revealed its view that previous protections were inadequate, and that the Court should therefore create a *Bivens* remedy for petitioner. But Congress's carefully considered decision to add new protections in 1978 (effective 1979; see Section 907 of the CSRA (92 Stat. 1227)) scarcely suggests that the Court should add new protections effective only at an earlier date. Similarly, the statements in the legislative history that the CSRA

This history reveals that Congress has always assumed responsibility for designing a complete remedial scheme for civil servants. Congress has revisited the remedial scheme frequently, addressing new problems or extending protections to employees it thought it unfair not to cover.

Moreover, it cannot be said that Congress did not intend to design a remedy for constitutional violations like that alleged by petitioner. Civil servants' constitutional rights were at the forefront of Congress's concern; Congress's intent to provide adequate protection for whistleblowers dominates the legislative history of the Lloyd-LaFollette Act, which established the basic structure of civil service remedies in force at the time of petitioner's demotion. Even the Pendleton Act was principally concerned with practices that, today at least, would be held to violate the Constitution—political dismissals and coerced political activity. See *Branti* v. *Finkel*, 445 U.S. 507 (1980); *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977). As we explain, and as the congressional amici assert (see page 44, *infra*), Congress has a strong institutional interest in protecting speech of the sort in which petitioner allegedly engaged, and Congress's repeated efforts to perfect the civil service remedies simply do not permit the conclusion that Congress envisioned that courts would consider themselves empowered to create additional remedies.

3. *When Congress Established the Civil Service Remedies, It Assumed that Courts Would Not Play an Active Role in Remedying Federal Employees' Grievances*

A statute is ordinarily presumed not to abrogate existing common law rights or remedies, unless there are clear contrary indications. See, *e.g.*, *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298 (1976), quoting *Texas*

---

provided "additional" protections for whistleblowers (Schroeder Am. Br. 13) shed no light on what protections were previously afforded; for the reasons we state, *Bivens* actions were not an available remedy before or after the CSRA.

& Pacific Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907). The Court has suggested that this presumption applies with less force when an act of Congress and federal common law are involved, because of the limited law-making powers of the federal courts. See *City of Milwaukee* v. *Illinois, supra.*

But however strong the presumption, it applies only to "*preexisting* right[s]" (*Texas & Pacific Ry.* v. *Abilene Cotton Oil Co., supra*, 204 U.S. at 437 (emphasis added)); it is "a presumption favoring the retention of long-established and familiar principles" (*Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952)). That is because the reason for this principle is that "Congress cannot be presumed to have been unaware of the relevant common-law history" (*City of Milwaukee* v. *Illinois, supra*, 451 U.S. at 337 (Blackmun, J., dissenting)). See also *Morton* v. *Mancari*, 417 U.S. 535, 550 (1974) (repeals by implication are not favored).

In *Carlson* v. *Green, supra*, the FTCA provision offered as a preclusive alternative remedy (28 U.S.C. 2680(h)) was enacted after *Bivens* was decided. By contrast, the statutes establishing petitioner's civil service remedies were enacted before *Bivens*. The presumption should, therefore, be reversed; Congress must have assumed that there was no implied damages remedy.[19] In the "'contemporary legal context'" prevailing when petitioner's civil service remedies were established (*Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, No. 80-203 (May 3, 1982), slip op. 25, quoting *Cannon* v. *University of Chicago*, 441 U.S. 677, 699 (1979)), Congress would have legislated the remedy for a constitutional violation that it considered appropriate. See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 272-273 (1979); *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978) (limiting the apparent reach of a judicially-

---

[19] See Note, *"Damages or Nothing"—The Efficacy of the Bivens-Type Remedy*, 64 Cornell L. Rev. 667, 667 (1979) (*Bivens* was "a dramatic departure from received law").

created remedy in admiralty because it conflicted with a statute that had been enacted before the remedy was created).

Indeed, until the late 1950's "federal courts were reluctant to play *any* significant role in supervising administrative decisions adverse to federal employees." Merrill, *Procedures for Adverse Actions Against Federal Employees*, 59 U. Va. L. Rev. 196, 199 (1973) (emphasis added).[20] The Court has noted this tradition of judicial nonintervention in civil service matters, and its decline. *Sampson* v. *Murray*, *supra*, 415 U.S. at 69-71; *United States* v. *Testan*, *supra*, 424 U.S. at 406. Thus, during the time when most of the civil service remedies available to petitioner were created, the "long-established and familiar principle[]" (*Isbrandtsen Co.* v. *Johnson*, *supra*, 343 U.S. at 783) was that remedies for civil servants' claims—including their constitutional claims—were the province of Congress and the executive branch. When a complex remedial scheme is designed in such a "contemporary legal context," there is plainly no basis for concluding that it envisions, or leaves room for, a judicially created damages remedy. See *Brown* v. *General Services Administration*, *supra*, 425 U.S. at 825-829 (Section 717 is an exclusive remedy in part because when Congress enacted Section 717 it believed, perhaps incorrectly, that there were no other effective remedies for employment discrimination by the federal government). This is particularly true when the statutory remedy created is then subject to Congress's constant superintendence.

---

[20] See, *e.g.*, *Bailey* v. *Richardson*, 182 F.2d 46 (D.C. Cir. 1950), aff'd by an equally divided Court, 341 U.S. 918 (1951); *Burnap* v. *United States*, 252 U.S. 512 (1920); *Keim* v. *United States*, 177 U.S. 290 (1900); *White* v. *Berry*, 171 U.S. 366 (1898); *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497 (1840). See generally Note, *Dismissal of Federal Employees—The Emerging Judicial Role*, 66 Colum. L. Rev. 719 (1966); Chaturvedit; *Legal Protection Available to Federal Employees Against Wrongful Dismissal*, 63 Nw. U.L. Rev. 287, 307-330 (1968).

4. *Creating a Personal Damages Remedy in This Context Would Thwart Important Congressional Policies*

As we noted, a remedial scheme must strike a balance among competing objectives. See pages 24-25, *supra*. In some instances—if the principal concern of the statutory scheme is broadly remedial, and the countervailing interests are of lesser importance—a court's creating a remedy that Congress did not intend may do relatively little damage to congressional policies. See, *e.g.*, *Mobil Oil Corp.* v. *Higginbotham*, *supra*; Stewart & Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1195, 1307-1316 (1982). That is not the case here, however. As the court of appeals pointed out (Pet. App. a-9 to a-10), Congress self-consciously balanced the need to protect federal employees' rights against the need to ensure that supervisors are willing to take justified personnel actions, so that the civil service will remain efficient, and Congress attached great importance to the latter interest. Creating a personal damages remedy will severely disturb that balance and harm important interests Congress sought to protect.

As Congress explained, shortly after petitioner brought this suit (S. Rep. No. 95-969, *supra*, at 4): "Throughout this country's history—and especially since [the Pendleton Act of] 1883—there has been a tension between protections established to insure that employees are hired and fired solely on the basis of their ability, and the need of managers and policymakers to have flexibility to perform their jobs." Beginning with the Pendleton Act, Congress and the agencies it empowered to deal with the civil service have undertaken a "task [that] * * * is simple to express but difficult to achieve: Allow civil servants to be able to be hired and fired more easily, but for the right reasons" (*ibid.*). See also H.R. Rep. No. 95-1403, *supra*, at 198; H.R. Rep. No. 1826, 47th Cong., 2d Sess. 1 (1882) (legislative history of the Pendleton Act) (Act designed to "pursue[] a middle course" between "life

tenure of appointees [and] removals at the will of the appointing power").

The problem of striking the proper balance has preoccupied Congress in part because managers in the civil service, in general, have little personal incentive, other than their own sense of duty, to take adverse actions against other employees. See 129 Cong. Rec. H8473 (daily ed. Aug. 11, 1978) (remarks of Rep. Schroeder). A manager's "failure to act probably would not be likely to cause superiors or others to take notice * * * [or] may simply not be visible to his superior or to those in a position to complain" (Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 Sup. Ct. Rev. 281, 309). A manager can "find ways to work around unsatisfactory employees, or * * * hope the employees will go elsewhere to work" (S. Rep. No. 95-969, *supra*, at 10).[21] A manager in the position of respondent—who, by virtue of his office, must review a large number of proposed adverse actions, but who generally need not work on a daily basis with the employee involved—has even less of a personal incentive to endorse an adverse action.

Consequently, any system of remedies that places substantial personal burdens on those managers who do take adverse actions gives them a strong incentive not to act. See *Butz* v. *Economou*, 438 U.S. 478, 525 (1978). The result can be serious morale problems and endemic inefficiency. See *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 168 (opinion of Powell, J.). It was a commonplace at the time this suit was brought that civil service appeals were so burdensome to supervisors and agencies that there was little reason for them to act against incompetent or unfit employees; concern with this problem permeates the discussions of civil service reform that led to the 1978 Act. See, *e.g.*, S. Rep. No. 95-969, supra, at 9-10 ("The manager in an appeal may come under severe attack, no mat-

---

[21] Certain provisions of the CSRA were addressed to this problem. See generally 5 U.S.C. (Supp. V) 5401 *et seq.*

ter how fairly the manager has proceeded. Managers embroiled in appeals often find that these processes consume all of their time and attention. Some managers simply avoid taking necessary steps to discipline or discharge employees in the first place."); H.R. Rep. No. 95-1403, *supra*, at 4 (agency that takes disciplinary action "does not benefit because it has to devote costly time to the defense of its action"); *id.* at 101 (President Carter's message on civil service reform); 129 Cong. Rec. H8463 (daily ed. Aug. 11, 1978) (remarks of Rep. Derwinski).

To whatever extent civil service procedures might deter a supervisor from acting, the deterrent effect of a personal damages action is vastly greater. See, *e.g.*, *Owen* v. *City of Independence*, 445 U.S. 622, 653 n.37, 655-656 (1980). "[I]t cannot be disputed seriously that claims frequently run against the innocent as well as the guilty" (*Harlow* v. *Fitzgerald*, No. 80-945 (June 24, 1982), slip op. 13); consequently, even though an official can raise an immunity defense, he will still know that if he takes an adverse personnel action he risks the psychological and economic burdens of litigation (*ibid.*) and the threat of ruinous personal liability. However remote that threat may seem, living with it for a number of years—this suit, for example, was brought in 1976 and has not yet gone to trial—is debilitating, and the prospect of facing such an ordeal would unquestionably deter many officials from taking justified actions.

It is not an answer that managers will enjoy a qualified immunity. When Congress has not addressed a remedial problem, the courts must strike a rough balance between the protection of rights and the need not to deter official action. See *Butz* v. *Economou*, *supra*, 438 U.S. at 503. The immunity doctrines, derived, like the damages remedy, from judicial traditions (see *Nixon* v. *Fitzgerald*, No. 79-1738 (June 24, 1982), slip op. 12-15) represent such a balance. For the reasons we have given, however, Congress's civil service remedies have struck a different balance—one that does not envision a judicially-created per-

sonal damages remedy, and that reflects the considerable importance Congress attached to preserving managerial flexibility. When "Congress has struck the balance for" the courts (*Mobil Oil Corp.* v. *Higginbotham*, *supra*, 436 U.S. at 623), the courts should not upset that balance.[22]

---

[22] Petitioner urges (Br. 23) that a *Bivens* remedy cannot be precluded unless Congress expressly so states. As we noted, Congress cannot be expected explicitly to preclude a remedy that did not exist at the time the legislation was enacted. Moreover, the Court emphasized the requirement of an explicit statement only in *Davis* v. *Passman*, *supra*, 442 U.S. at 246-247, where the issue was whether Congress had intended to preclude *all* remedies for a constitutional violation. See *Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1366 (1953) ("The denial of any remedy is one thing * * *. But the denial of one remedy while another is left open, or the substitution of one for another, is very different."). In *Carlson* v. *Green*, *supra*, the Court specifically stated that the question is not whether Congress has used particular words but simply "whether Congress has indicated that it intends the statutory remedy to replace, rather than to complement, the *Bivens* remedy" (446 U.S. at 19 n.5).

In any event, the legislative history of the CSRA—the first significant civil service legislation after *Bivens*—contains a clear statement that Congress did not envision *Bivens* actions by federal employees like petitioner. In the course of its consideration of why incompetent civil servants were not removed more easily—a subject that, as we have noted, was a major preoccupation—the Senate Report lists what it considers the principal reasons (S. Rep. No. 95-969, *supra*, at 9-10):

> Performance evaluation procedures do not work well enough to distinguish employees whose performance is below an acceptable level and to make the charges stick.
>
> Fear of employee appeals, grievances and the protracted problems they create for the employee, the manager and the work unit involved.
>
> Natural reluctance on the part of managers to fire an employee, especially when the manager's performance is not directly linked to that of his subordinates.
>
> The lengthy and complex appeals processes adversely affect employees and managers alike. The procedures are so confusing they often discourage the proper exercise of employee rights. The manager in an appeal may come under severe attack, no

In sum, the civil service remedies available to petitioner were a carefully constructed remedial scheme that coordinated the roles of the agency initiating an adverse action, the Civil Service Commission, and the reviewing courts. The development of those remedies shows that Congress superintended and adjusted them, taking responsibility to ensure a complete and equitable remedy. Moreover, Congress did so in a legal context in which courts traditionally had played very little role in remedying grievances arising from the civil service employment relationship. It is clear, therefore, that Congress did not envision that the courts would supplement the civil service remedies with a personal damages action; and for the Court to take such a step now would destroy the careful balance Congress has struck between the rights of employees and the need for managerial flexibility.

---

matter how fairly the manager has proceeded. Managers embroiled in appeals often find that these processes consume all of their time and attention.

President Carter gave essentially the same explanation. See H.R. Rep. No. 95-1403, *supra*, at 2.

It is most unlikely that Congress and the President would not have mentioned the threat of ruinous personal damages suits as a factor inhibiting official action, if they understood such suits to be permitted. Attorney General Bell, at approximately the same time, stated elsewhere that "[d]espite the small odds an employee will actually be held liable in a civil suit, morale within the federal service has suffered as employees have been dragged through drawn-out lawsuits, many of which are frivolous" (Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. on Leg. 1, 6 (1979)). By not mentioning *Bivens* actions as one of the factors inhibiting managers, the legislative history of the CSRA therefore clearly indicates that Congress assumed such actions could not be brought. To require any more clear a statement than this would have the paradoxical effect of attributing to Congress an intent to permit *Bivens* suits in precisely those contexts in which the unavailability of such relief is widely taken for granted.

We note that amicus curiae National Treasury Employees Union (Br. 22-23 n.12) agrees with us that the legislative history shows that when Congress enacted the CSRA, it assumed federal employees could not bring *Bivens* actions.

C. Special Factors Require the Court To Hesitate Before Creating an Implied Damages Remedy for Federal Employees

The Court ruled in *Bivens* that a damages remedy based directly on the Constitution should not be implied if there are "special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. As we explained, this principle recognizes that in certain contexts there may be insufficient reason to infer, from a grant of jurisdiction alone, that Congress intended courts to enforce traditional judicial remedies. See page 17, *supra*.

This is such a context. Although petitioner asserts a constitutional right, his claim to special judicial protection is substantially weaker than that of the other plaintiffs whom the Court has permitted to maintain *Bivens* actions. Moreover, the federal employment relationship has traditions of its own that suggest that courts should not play the role in evaluating employees' grievances that a *Bivens* remedy would compel. These factors may be independently sufficient to preclude a *Bivens* action here; at the very least, they require any doubt about the preclusive effect of the alternative remedy to be resolved against petitioner.

1. *Federal Employees Challenging Adverse Personnel Actions Do Not Have a Strong Claim to Judicial Protection*

Both Justice Harlan in *Bivens* (403 U.S. at 407) and the Court in *Davis* (442 U.S. at 241-242) alluded to the federal courts' historically important role in protecting particularly vulnerable individuals and groups in society. The claimants in *Bivens*, *Davis*, and *Carlson* all arguably belonged to such groups. Petitioner, however, has a substantially weaker claim to the special protection of the courts.

In *Bivens*, federal agents allegedly conducted an illegal and humiliating search and seizure of a person in his

home. In concluding that an implied damages remedy was appropriate, the Court explained that this wrong is distinct from a private trespass, and justifies the creation of a federal judicial remedy, because it involves the exercise of sovereign powers that neither the citizen nor local authorities can effectively resist. 403 U.S. at 394. Consequently, "'[i]n such cases there is no safety for the citizen, except in the protection of the judicial tribunals'" (*id.* at 394-395, quoting *United States* v. *Lee*, 106 U.S. 196, 219 (1882)).[23]

In *Carlson* v. *Green*, the complaint alleged that federal officials denied proper medical care to a prisoner, who was, of course, under the control of the responsible officials. See 446 U.S. at 16 n.1. In both *Carlson* (see *ibid.*) and *Davis*, the alleged wrongs were committed against groups historically subject to discrimination, who are also properly the object of special judicial protection. See *United States* v. *Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). In addition, had the act complained of in *Davis* been committed by a private party, it would have been illegal. See 42 U.S.C. 2000e-2(a)(1).

Federal employees, by contrast, are not a historically disadvantaged or vulnerable group. *Bivens* itself, in describing special factors that might counsel hesitation, noted that because "Congress [is] normally quite solicitous where the federal purse [is] involved," the Court should be less ready to create a damages remedy in favor of the government when Congress has not acted (403 U.S. at 396, citing *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947)). The civil service, too, is an object of congressional solicitude; in a sense the civil service *is* the government. Congress created the civil service to implement its programs, and it has an interest in maintaining an ef-

---

[23] See also *Pennsylvania* v. *Mimms*, 434 U.S. 106, 122 (1977) (Stevens, J., dissenting); J. Ely, *Democracy and Distrust* 97 (1980) (Fourth Amendment is intended in part to prevent police exercising "low-visibility discretion" from discriminating on the basis of "social station and other [impermissible] factors").

ficient service; both efficiency and morale are impaired when employees are discharged or demoted for improper reasons. As we have shown, this interest has frequently moved Congress to act to protect federal employees.

Nor can it be claimed that employees who criticize their agencies are in special need of judicial protection. The legislative history of both the Lloyd-LaFollette Act and the Civil Service Reform Act of 1978—the two most important pieces of civil service legislation in this century—demonstrate Congress's strong institutional interest in protecting whistleblowers.[24]

Moreover, if petitioner had been privately employed, his demotion for making certain statements would not have been illegal and would have entitled petitioner, at most, to a contractual remedy. Unlike the actions complained of in *Bivens* and *Carlson*, the government's action in this case reflected none of the attributes of sovereignty. As the court of appeals remarked, "[t]he role of the Government as an employer toward its employees is fundamentally different from its role as sovereign over private citizens generally" (Pet. App. a-6 to a-7). In practical terms, the power of the government over petitioner is indistinguishable from the power of a private employer over an employee. The concrete harm to petitioner (see generally *Carey* v. *Piphus*, 435 U.S. 247 (1978)) is no greater than it would have been if a private employer had demoted him for speaking. In noting this, we of course do not intend to question the existence of the well-established constitutional right asserted by petitioner. But petitioner's need for special judicial protection for this right, in the form of a judicially created remedy against an official, would be weak even if fully effective alternative remedies did not exist.

---

[24] The principal theme of the amicus brief in support of petitioner filed by Rep. Schroeder and other members of Congress is precisely that Congress has such a strong institutional interest. See, *e.g.*, Am. Br. 1-2, 17-18.

2. *Disputes Concerning the Federal Employment Relationship Are Properly Addressed, in the First Instance, in a Specialized Administrative Agency, Not a Court*

Federal labor law, in both the public and private sector, reflects a consistent congressional judgment that employment disputes are best resolved, in the first instance, not by a court but by an expert body more closely familiar with the employment relationship. This, too, strongly suggests that the Court should hesitate before creating a remedy that requires a court to resolve employment disputes de novo. See, *e.g.*, *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 461-464 (1974); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963); Sunstein, *supra*, 49 U. Chi. L. Rev. at 414.

When Congress first turned its attention to the civil service, in 1883, it created an administrative agency (the Civil Service Commission), carefully required the Commission to be bipartisan, and gave it and the President a broad charter to carry out the purposes of the Pendleton Act. When Congress first established procedural protections for civil servants threatened with dismissal, in the Lloyd-LaFollette Act, it specified agency procedures, not judicial proceedings. When Congress determined to reform the Civil Service, in 1978, it again focused its attention on the administrative agencies involved: it reorganized the Commission's functions, placing them in two new agencies; it specified that one of those agencies, the Merit Systems Protection Board, was to be concerned with the resolution of employment disputes; and it established the Office of the Special Counsel to investigate and act on certain claims of unlawful employment practices. When Congress established penalties for supervisors who violated employees' First Amendment rights or otherwise committed a prohibited personnel practice, it provided for the Special Counsel and the Board to enforce those penalties; it did not empower private parties to seek massive damages recoveries by bringing suit for

punitive damages. See generally *Wren* v. *Merit Systems Protection Board*, 681 F.2d 867 (D.C. Cir. 1982).

This consistent choice of an administrative, not a judicial, forum reflects Congress's determination that expertise and familiarity with the peculiarities of the employment relationship are important to the resolution of employment disputes. See, *e.g.*, *Wathen* v. *United States*, 527 F.2d 1191, 1197-1198 (Ct. Cl. 1975); *Holden* v. *Finch*, 446 F.2d 1311, 1316-1317 (D.C. Cir. 1971).[25] Federal labor law in the private sector, too, reflects the premise that courts are less well suited to resolving employment disputes than persons or agencies that are closer to the situation and more experienced with the nature of employment relationships. Rights under the National Labor Relations Act generally must be asserted not in court initially, but before the National Labor Relations Board, the decisions of which are subject only to limited judicial review; a principal reason for this rule is the Board's expertise and knowledge of industrial relations. See, *e.g.*, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951). Similarly, a centerpiece of national labor policy is that the decisions of labor arbitrators are entitled to great deference from the courts. See, *e.g.*, *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960) ("The labor arbitrator performs functions which are not normal to the courts;

---

[25] The constitutional standard that petitioner invokes, while of course enforced by courts, is on its face better suited to being applied by a body with expertise about the employment relationship. See *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 414 (1979); *Pickering* v. *Board of Education*, 391 U.S. 563, 570 & n.3 (1968) (First Amendment rights of public employees turn in part on evaluation of threat to "discipline by immediate supervisors or harmony among coworkers" and of nature of working relationship between speaker and supervisor whom he criticizes). See also T. Emerson, *The System of Freedom of Expression* 570 (1970). (In regulating speech of government employees related to their jobs, "the controlling factors are primarily matters of internal management, and the issues must largely be resolved in those terms rather than on free speech considerations.")

the considerations which help him fashion judgments may indeed be foreign to the competence of courts. * * * The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.").

Petitioner and the congressional amici appear to recognize the strength of the tradition that counsels against judicial intrusion into the employment relationship, and the force of the court of appeals' observation that allowing a *Bivens* remedy "might encourage aggrieved employees to bypass the statutory and administrative remedies in order to seek direct judicial relief and thereby deprive the government of the opportunity to work out its personnel problems within the framework it has so painstakingly established" (Pet. App. a-10 to a-11). They implicitly acknowledge that the Court would be warranted in at least requiring federal employees to exhaust the civil service remedies before bringing a *Bivens* action. See Pet. Br. 21; Schroeder et al. Am. Br. 9 n.9. We agree that, at a minimum, it would be wholly inappropriate to allow an employee to bring a *Bivens* action without exhausting the "detailed administrative and judicial process designed [by Congress] to provide an opportunity for nonjudicial and nonadversary resolution of claims" (*Great American Federal Savings & Loan Association* v. *Novotny*, 442 U.S. 366, 372-373 (1979)).[26]

---

[26] *Novotny* emphasized the importance of the carefully designed congressional remedy established in Title VII of the Civil Rights Act of 1964, a remedy that must be invoked before a claimant may bring suit (see *Brown* v. *General Services Administration*, *supra*). Title VII is the single major exception to the principle that courts will avoid, if possible, de novo review of complaints arising from the employment relationship. See *Chandler* v. *Roudebush*, 425 U.S. 840 (1976); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-799 (1973). But the Court has recognized in several contexts that the remedies for employment discrimination are unusually thorough (see, *e.g.*, *Johnson* v. *Railway Express Agency*, 421 U.S. 454 (1975); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48 (1974)) because the eradication of employment discrimination is "a policy that

But even if a claimant exhausts his administrative remedies against the government, review of his claims in a *Bivens* action against an individual official would have to be de novo.[27] Moreover, while Congress could not have intended to allow the civil service remedies to be bypassed, it is also implausible to suppose that Congress intended the redundant and incoherent remedial scheme that petitioner advocates—in which a claimant, having vindicated his personal interests through the civil service remedies by achieving a full measure of compensation (see pages 31-32, *supra*), would be able to bring a separate action for the purpose of imposing punishment on an individual official and gaining a bounty. Petitioner had—and pursued—a remedy that followed the preferred form of initial agency consideration and judicial review, and that provided full compensation. In view of Congress's careful attention to the area, and the many factors counselling judicial restraint, there is no basis for according him an additional, court created, damages remedy.

Congress considered of the highest priority" (*Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)).

[27] Plainly the individual defendant in a *Bivens* action would not be bound by adverse findings of fact made in the administrative proceeding against the government, to which the individual official was not a party. (The claimant might, however, be bound if the agency prevailed in the administrative forum. See *Kremer* v. *Chemical Construction Corp.*, No. 80-6045 (May 17, 1982); *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 399, 421-422 (1966)).

Petitioner and amici assert that *Davis* v. *Passman*, *supra*, precludes any argument that the federal employment relationship gives rise to special factors counselling hesitation. But the plaintiff in *Davis* was a congressional employee, not a civil service employee; the two categories have not traditionally been treated in the same fashion. Moreover, the plaintiff in *Davis* had no other remedy; the Court's choice was therefore between allowing courts to review grievances arising from the employment relationship de novo, on the one hand, and leaving the claimant remediless, on the other. In addition, *Davis* involved employment discrimination of the sort outlawed by Title VII. See page 47 note 26, *supra*.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

BARBARA L. HERWIG
WENDY M. KEATS
Attorneys

DECEMBER 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 393403 1184